Supreme Court, U.S.
MAR 10 2003

(5)

No. 02-337

In the Supreme Court of the United States

PHILLIP T. BREUER, PETITIONER

v.

JIM'S CONCRETE OF BREVARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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36 pp

QUESTION PRESENTED

The federal removal statute, 28 U.S.C. 1441(a), provides that, "[e]xcept as otherwise expressly provided by Act of Congress," any action in state court of which the federal district courts also have jurisdiction may be removed to federal district court. The Fair Labor Standards Act of 1938, in 29 U.S.C. 216(b), provides that an action to recover liability under the Act "may be maintained against any employer * * * in any Federal or State court of competent jurisdiction by any one or more employees." The question presented is whether such an action filed in state court under 29 U.S.C. 216(b) is subject to removal to federal court under 28 U.S.C. 1441(a).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	3
Argument:	
Employee actions filed in state court under the Fair Labor Standards Act may be removed to federal court	5
A. The FLSA's use of the word "maintain" does not provide an express exception to removal	6
B. The FLSA's use of the word "bring" in other provisions does not suggest that the word "maintain" in Section 216(b) expressly bars removal	15
C. The principle that removal legislation should be narrowly construed does not defeat a defendant's right to remove an action under Section 216(b)	20
D. Petitioner's reliance on subsequent legislative history and policy arguments do not furnish a basis for finding that the FLSA expressly bars removal	23
Conclusion	28

TABLE OF AUTHORITIES

Cases:

American Fin. Co. v. *Bostwick*, 23 N.E. 656 (Mass. 1890)	19
Anson v. *University of Tex. Health Sci. Ctr.*, 962 F.2d 539 (5th Cir. 1992)	19
Avco Corp. v. *Aero Lodge, No.735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968)	27
Bay Area Laundry & Dry Cleaning Pension Trust Fund v. *Ferbar Corp.*, 522 U.S. 192 (1997)	11
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Cook County v. *United States ex rel. Chandler*, No. 01-1572 (Mar. 10, 2003) 22
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Crawford Fitting Co. v. *J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) 13
Custis v. *United States*, 511 U.S. 485 (1994) 9
Donovan v. *University of Tex.*, 643 F.2d 1201 (5th Cir. 1981) 18
Estate of Cowart v. *Nicklos Drilling Co.*, 505 U.S. 469 (1992) 27
George Moore Ice Cream Co. v. *Rose*, 289 U.S. 373 (1933) 12
Gregory v. *Ashcroft*, 501 U.S. 452 (1991) 6
Harris Trust & Sav. Bank v. *Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) 11
Hill v. *Moss-American, Inc.*, 309 F. Supp. 1175 (N.D. Miss. 1970) 8, 26
Hirschbiel v. *Johnson*, 118 F. Supp. 2d 903 (N.D. Ind. 2000) 27
Hoffmann-La Roche Inc. v. *Sperling*, 493 U.S. 165 (1989) 12, 19
INS v. *St. Cyr*, 533 U.S. 289 (2001) 10
Johnson v. *Butler Bros.*, 162 F.2d 87 (8th Cir. 1947) 6
Keil v. *CIGNA*, 978 F. Supp. 1365 (D. Colo. 1997) 27
Lewis v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001) 7
Linthicum v. *Calvin*, 57 S.W.3d 855 (Mo. 2001) 19
Metropolitan Life Ins. Co. v. *Taylor*, 481 US. 58 (1987) 27
Morton v. *Mancari*, 417 U.S. 535 (1974) 22
O'Connell v. *Champion Int'l Corp.*, 812 F.2d 393 (8th Cir. 1987) 20

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Posadas v. *National City Bank*, 296 U.S. 497 (1936) 22
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Rodriguez v. *United States*, 480 U.S. 522 (1987) .....
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Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 22
Second Employers' Liab. Cases, 223 U.S. 1 (1912) 13
Shamrock Oil & Gas Corp. v. *Sheets*, 313 U.S. 100 (1941) 20
Smallwood v. *Gallardo*, 275 U.S. 56 (1927) 12, 18
TVA v. *Hill*, 437 U.S. 153 (1978) 22
United States v. *Bass*, 404 U.S. 336 (1971) 6
United States v. *Borden Co.*, 308 U.S. 188 (1939) 22
United States v. *Monsanto*, 491 U.S. 600 (1989) 21
United States v. *Providence Journal Co.*, 485 U.S. 693 (1988) 21
United States v. *Shabani*, 513 U.S. 10 (1994) 9
United States v. *X-Citement Video, Inc.*, 513 U.S. 64 (1994) 26
Williams v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942) 5
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 (1868) 22

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Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470 14
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Act of Apr. 5, 1910, ch. 143, 36 Stat. 291 (45 U.S.C. 56) 11, 14
Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1094 (28 U.S.C. 71 (1934)) 4, 14, 21
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Statutes and regulation—Continued: Page

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28 U.S.C. 1292(b) 3
28 U.S.C. 1331 ..... 3-4, 5
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28 U.S.C. 1404 13
28 U.S.C. 1441 (62 Stat. 937) 3, 5, 6, 15
28 U.S.C. 1441(a) ..... *passim*
28 U.S.C. 1441(b) 5
28 U.S.C. 1445 7
28 U.S.C. 1445(a) 7, 14
28 U.S.C. 1445(b) 7, 14
28 U.S.C. 1445(c) 7, 25, 26
28 U.S.C. 1446(a) 13
Act of Oct. 26, 1949, ch. 736, § 14, 63 Stat. 919 17
Age Discrimination in Employment Act of 1967,
29 U.S.C. 621 *et seq.* 2
29 U.S.C. 625 2
29 U.S.C. 626(b) 2, 12
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et seq. 27
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et seq. 27
Employee Polygraph Protection Act of 1988, 29 U.S.C.
2005(c)(2) 2
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29 U.S.C. 1001 *et seq.*:
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29 U.S.C. 204(f) 16
29 U.S.C. 211 1
29 U.S.C. 211(a) 16, 17
29 U.S.C. 212(b) 16, 17
29 U.S.C. 216 ..... 1, 24

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No. 93-259, § 6(d)(1), 88 Stat. 61 24
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2617(a)(2) 2
Jones Act, 46 U.S.C. App. 688 *et seq.*:
46 U.S.C. App. 688(a) 7, 10
46 U.S.C. App. 688(b) 11
Labor Management Relations Act, 1947, § 301,
29 U.S.C. 185 27
McCarran Amendment, 43 U.S.C. 666 23
Portal-to-Portal Act of 1947, ch. 52, § 5(a), 61 Stat. 87
(29 U.S.C. 256) 12, 20
Securities Act of 1933, ch. 38, 48 Stat. 86 (15 U.S.C.
77a *et seq.*):
15 U.S.C. 77p(b) 11
15 U.S.C. 77v(a) (§ 22(a), 48 Stat. 86-87) 8, 14-15
7 U.S.C. 2106(e)(6) 10
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15 U.S.C. 78bb(f)(1) 11
15 U.S.C. 1719 8
15 U.S.C. 2805(a) 10
15 U.S.C. 3612 8
18 U.S.C. 371 9
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26 U.S.C. 7402(c) 10
26 U.S.C. 7422(a) 11
26 U.S.C. 7422(b) 11
29 U.S.C. 1451(a) 11
43 U.S.C. 620m 10
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46 U.S.C. App. 761(a) 10
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Statutes and regulation—Continued: Page

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48 U.S.C. 1421i(h)(2) 11
Ala. Code § 6-3-20 (1993) 13
Alaska Stat. § 22.15.080 (Michie 1995) 13
Fla. Stat. Ann. § 47.122 (West 1994) 13
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29 C.F.R. 1626.15(a) 2

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(3d ed. 1933) 10
(7th ed. 1999) 6
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(1938) 17, 24
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(1993) 6

Miscellaneous—Continued: Page

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INTEREST OF THE UNITED STATES

The Secretary of Labor is charged with the responsibility of implementing and enforcing the Fair Labor Standards Act of 1938 (FLSA). See, *e.g.*, 29 U.S.C. 211, 216(c). The FLSA also authorizes private actions by employees to recover unpaid wages and liquidated damages for violations of the Act. 29 U.S.C. 216(b). The question presented is whether an employee's action that is filed in state court under 29 U.S.C. 216(b) is subject to removal to federal court under 28 U.S.C. 1441(a). The Secretary has an interest in ensuring that 29 U.S.C. 216 is interpreted correctly and in a way that is consistent with the enforcement

objectives of the FLSA. The Secretary of Labor also has an interest in this case because the Court's decision is likely to determine the right of removal under two other statutes that the Secretary administers that are worded similarly to 29 U.S.C. 216(b), the Employee Polygraph Protection Act of 1988, 29 U.S.C. 2005(c)(2), and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2617(a)(2).

This Court's decision also may affect whether a defendant may remove an action brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, which is administered by the Equal Employment Opportunity Commission. 29 U.S.C. 625; 29 C.F.R. 1626.15(a). The ADEA provides that an aggrieved person "may bring a civil action in any court of competent jurisdiction," 29 U.S.C. 626(c), and that the Act "shall be enforced in accordance with the powers, remedies, and procedures provided in [29 U.S.C. 216]." 29 U.S.C. 626(b).

STATEMENT

1. Petitioner sued respondent, his former employer, in Florida state court for unpaid overtime wages, liquidated damages, prejudgment interest, and attorney's fees under the FLSA, 29 U.S.C. 216(b). Pet. App. 1a-2a. Section 216(b) makes an employer that violates the minimum wage and overtime provisions of the Act liable to the affected employees "in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." 29 U.S.C. 216(b). Section 216(b) further provides that "[a]n action to recover the liability prescribed [in Section 216(b)] may be maintained against any employer (including a public agency) in any Federal or State court of competent

jurisdiction by any one or more employees." 29 U.S.C. 216(b).

Respondent removed the action to the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. 1441. Pet. App. 2a. That section provides that, "[e]xcept as otherwise expressly provided by Act of Congress," an action of which the federal district courts have original jurisdiction may be removed by the defendant to federal district court. 28 U.S.C. 1441(a). Petitioner moved to remand the case, arguing that the language in the FLSA stating that an action "may be maintained" in state or federal court constitutes an "expressly provided" exception to the right of removal under 28 U.S.C. 1441(a). Pet. App. 2a.

2. The district court denied petitioner's motion to remand, and certified the issue for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 2a, 8a-9a.

3. The court of appeals affirmed in a per curiam opinion. Pet. App. 1a-6a. The court of appeals "adopt[ed] the reasoning" of the First Circuit in *Cosme Nieves* v. *Deshler*, 786 F.2d 445, cert. denied, 479 U.S. 824 (1986), which "held that without an 'explicit statutory directive by Congress,' FLSA cases may be removed from state court to federal court, and that § 216(b) was not such an express statutory prohibition against removal." Pet. App. 3a (quoting *Cosme Nieves*, 786 F.2d at 451). The court of appeals observed that, in other statutes where Congress has expressly prohibited removal, "it did so in direct, unequivocal language." *Id.* at 5a.

SUMMARY OF ARGUMENT

Suits under the Fair Labor Standards Act are ones over which federal courts unquestionably have original subject matter jurisdiction. 29 U.S.C. 216(b); 28 U.S.C.

1331, 1337. As such, the federal removal statute, 28 U.S.C. 1441(a), authorizes removal of such actions "except as otherwise expressly provided by Act of Congress." The provision of the FLSA authorizing employee actions, 29 U.S.C. 216(b), provides that "[a]n action to recover * * * may be maintained against any employer * * * in any Federal or State court of competent jurisdiction." That language does not expressly prohibit removal, as other federal statutes have done when Congress intended to foreclose a federal court's removal jurisdiction.

The word "maintain" in Section 216(b) does not, expressly or otherwise, communicate an intent to foreclose removal. By authorizing an employee to maintain suit in state or federal court, Section 216(b) provides a right of action over which federal and state courts have concurrent jurisdiction. Although the word maintain may imply a right to litigate a cause of action to final judgment, removal of an action does not impair that right; removal merely transfers the case from state court to federal court, where the employee's right of action may be litigated to final judgment. Moreover, Congress enacted the FLSA against the backdrop of the defendant's long-standing right to remove "[a]ny" suit arising under federal law, Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1094 (codified at 28 U.S.C. 71 (1934)), and Congress therefore presumably intended that employee actions filed in state court would be subject to the defendant's pre-existing right of removal. Petitioner's remaining contentions also do not provide a basis for concluding that the FLSA expressly prohibits removal.

ARGUMENT

EMPLOYEE ACTIONS FILED IN STATE COURT UNDER THE FAIR LABOR STANDARDS ACT MAY BE REMOVED TO FEDERAL COURT

The general removal statute, 28 U.S.C. 1441, provides that, "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant * * * to the district court of the United States." 28 U.S.C. 1441(a). The removal statute also provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the * * * laws of the United States shall be removable without regard to the citizenship or residence of the parties." 28 U.S.C. 1441(b).

Employee actions under the FLSA, 29 U.S.C. 216(b), are indisputably within the original jurisdiction of the district courts of the United States. By providing in 29 U.S.C. 216(b) that an employee action "may be maintained * * * in any Federal * * * court of competent jurisdiction," the Act confers jurisdiction on federal courts over FLSA claims. *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386, 390 & n.3 (1942). Moreover, because the FLSA is an Act of Congress regulating commerce, federal courts have federal question jurisdiction, 28 U.S.C. 1331, 1337, over suits brought to enforce the FLSA. Accordingly, employee actions under the FLSA are subject to removal unless the FLSA "expressly provide[s]" an exception to removal. 28

U.S.C. 1441(a). Nothing in the FLSA, however, contains an express bar to removal.[1]

A. The FLSA's Use Of The Word "Maintain" Does Not Provide An Express Exception To Removal

1. Section 1441(a) authorizes removal of civil suits within a federal district court's original jurisdiction unless removal is "expressly" foreclosed by an Act of Congress. The ordinary or common understanding of the word "expressly" is "[c]learly and unmistakably communicated; directly stated." *Black's Law Dictionary* 601 (7th ed. 1999); *Webster's (Third) New International Dictionary* 803 (1993) ("in direct or unmistakable terms * * * explicitly, definitely, directly"). Thus, the statutory text must be explicit in foreclosing removal of an action otherwise within a federal court's removal jurisdiction. As this Court has explained in other contexts, "the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).

[1] In 1947, the Department of Labor, on behalf of the Administrator of the Wage and Hour Division, filed an amicus brief in the Eighth Circuit in *Johnson* v. *Butler Bros.*, 162 F.2d 87 (1947), arguing that the policies underlying the FLSA and the text of the Act supported the conclusion that an employee may maintain an action under 29 U.S.C. 216(b) without the possibility of removal of the suit to federal court. Since that time, Congress has amended the removal statute to provide that cases falling within the federal court's original jurisdiction are subject to removal "[e]xcept as otherwise expressly provided by Act of Congress." Act of June 25, 1948, ch. 646, 62 Stat. 937. In light of that amendment, and upon further consideration, the Secretary has concluded that FLSA actions brought by employees are subject to removal.

Section 1441(a)'s requirement of an express bar to removal has been satisfied in numerous other instances in which Congress has foreclosed removal "in direct, unequivocal language." Pet. App. 5a. Thus, 28 U.S.C. 1445 is entitled "*[n]onremovable actions*" and provides:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under [the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*], *may not be removed* to any district court of the United States.
>
> (b) A civil action in any State court against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11706 or 14706 of title 49, *may not be removed* to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.
>
> (c) A civil action in any State court arising under the workmen's compensation laws of such State *may not be removed* to any district court of the United States.
>
> (d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 *may not be removed* to any district court of the United States.

28 U.S.C. 1445 (emphasis added); see also *Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455 (2001) (action under the Jones Act, 46 U.S.C. App. 688(a), is not subject to removal because the Jones Act incorporates the FELA's prohibition against removal).

Congress elsewhere has used similarly explicit language to foreclose the exercise of the federal court's

removal jurisdiction. 15 U.S.C. 77v(a) ("*No case* arising under this subchapter [of the Securities Act of 1933] and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States.") (emphasis added); 15 U.S.C. 1719 ("*No case* arising under [Interstate Land Sales Full Disclosure Act] and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States, except where the United States or any officer or employee of the United States in his official capacity is a party.") (emphasis added); 15 U.S.C. 3612 ("*No case* arising under [the Condominium and Cooperative Abuse Relief Act of 1980] and brought in any State court of competent jurisdiction *shall be removed* to any court of the United States, except where any officer or employee of the United States in his official capacity is a party.") (emphasis added).

As a basis for finding an express exception to removal, petitioner relies on the provision in the FLSA that authorizes employee actions, 29 U.S.C. 216(b), which provides that "[a]n action to recover * * * may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees." 29 U.S.C. 216(b). That language, however, does not even intimate that it is concerned with the issue of removal, much less provide the express exception to the right of removal that Congress has provided in other statutes. See *Hill* v. *Moss-American, Inc.*, 309 F. Supp. 1175, 1178 (N.D. Miss. 1970) ("No mention of removal is made in the [FLSA] itself and no reference is made to it in the general removal or other federal statutes."); 1A James W. Moore, *Moore's Federal Practice* ¶ 0.167[5], at 472 (2d ed. 1996) ("[T]he provision of the [FLSA] that the employee's suit 'may be maintained in any court of

competent jurisdiction' * * * [is an] ambiguous phrase [and] is certainly not an express provision against removal within the meaning of § 1441."); see also 14C Charles A. Wright et al., *Federal Practice and Procedure* § 3729, at 235 (1998) (referring to "use of the ambiguous term 'maintain' in the statute").

This Court has recognized that, where Congress has given explicit treatment to an issue in other statutes, the absence of similar language in the particular statute at hand is strong evidence bearing on congressional intent. *E.g.*, *United States* v. *Shabani*, 513 U.S. 10, 14 (1994) (in light of "explicit requirement" of overt act requirement in general conspiracy statute, 18 U.S.C. 371, Congress's "silence" on the issue in drug conspiracy statute, 18 U.S.C. 846, "speaks volumes"); accord *Custis* v. *United States*, 511 U.S. 485, 492 (1994); *Palmore* v. *United States*, 411 U.S. 389, 395 & n.5 (1973). That same principle is equally true here. "If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here." *Cosme Nieves*, 786 F.2d at 451 (footnote omitted).

2. Petitioner argues (Br. 8, 30, 31) that the requirement in 28 U.S.C. 1441(a) that a prohibition against removal be "expressly provided" may be satisfied so long as the prohibition is "grounded" in some "text" of an Act of Congress, and that the word "maintain" in the text of Section 216(b) supplies a sufficient basis for finding such a prohibition under the FLSA. Because the word "maintain," however, does not in express terms even address removal, petitioner's argument, at bottom, is that the necessary *implication* of the word "maintain" prohibits removal. But Section 1441(a) requires an *express* exception in an Act of Congress. Thus, an inference from a word that is at best ambigu-

ous is insufficient. Cf. *INS* v. *St. Cyr*, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.").

In any event, there is no basis for inferring from the word "maintain" in the FLSA that Congress intended to prohibit removal. By providing that "[a]n action to recover * * * may be maintained * * * in any Federal or State court of competent jurisdiction," Section 216(b) is most naturally understood to confer on an employee a right to sue, and to file the action in either a state or federal court of competent jurisdiction. "To maintain an action or suit may mean to commence or institute it; the term imports the existence of a cause of action." *Black's Law Dictionary* 1143 (3d ed. 1933). Congress thus often has used the term "maintain" to grant a substantive cause of action,[2] or conversely, to

[2] *E.g.*, 7 U.S.C. 2106(e)(6), 2707(e)(3), 3405(e) (Secretary of Agriculture "may maintain a suit" to collect certain assessments); 15 U.S.C. 2805(a) (franchisee "may maintain a civil action" against a franchiser with respect to certain petroleum marketing); 16 U.S.C. 416 (United States "may maintain an action" to recover certain leased premises in military parks); 26 U.S.C. 7402(c) (federal employees injured in discharging their duties under Internal Revenue Code may "maintain an action for damages"); 43 U.S.C. 620m, 1551(c) (states "may maintain an action" in the Supreme Court to enforce certain federal obligations concerning the Colorado River); 46 U.S.C. App. 688(a) (seaman may "maintain an action for damages"); 46 U.S.C. App. 761(a) (representative of person who died on high seas "may maintain a suit for damages in the district courts of the United States"); 46 U.S.C. App. 764 ("right of action" granted by foreign law for death on high seas "may be maintained" in the courts of the United States); 46 U.S.C. App. 1242(d) (persons who hold mortgages, maritime claims, or attachment liens on vessels seized by government during national

foreclose one.[3] Indeed, Congress used the term "maintain" to refer to a cause of action even before the passage of the FLSA. *E.g.*, Act of Apr. 5, 1910, ch. 143, 36 Stat. 291 (codified at 45 U.S.C. 56); Act of Mar. 3, 1897, ch. 372, § 4, 29 Stat. 622 (codified at 16 U.S.C. 416). This Court, too, often has employed the term "maintain" to refer to a right of action. *E.g.*, *Harris Trust & Sav. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (describing trustee's common law right to "maintain an action for restitution"); *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 200-201 (1997) (explaining that under 29 U.S.C. 1451(a), "[a] plan cannot maintain an action until the employer misses a scheduled withdrawal liability").

A right of action, of course, generally carries with it the authority to litigate a suit to final judgment. But the right to litigate an action to final judgment does not foreclose, expressly or otherwise, removal of the action to federal court, where it thereafter may be litigated to final judgment. Petitioner therefore errs in relying on this Court's recognition that "[t]o maintain a suit is to uphold, continue on foot, and keep from collapse a suit

emergency may "maintain" an action for compensation); 48 U.S.C. 1421i(h)(2) (suit may "be maintained" in federal courts against government of Guam for improperly assessed taxes).

[3] *E.g.*, 15 U.S.C. 77p(b), 78bb(f)(1) (no class actions concerning certain securities violations "may be maintained"); 26 U.S.C. 7422(a) and (b) (no suit for tax refund may "be maintained" until claim for refund or credit has been filed, but suit "may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress"); 45 U.S.C. 56 ("No action shall be maintained under [FELA] unless commenced within three years from the day the cause of action accrued."); 46 U.S.C. App. 688(b) ("No action may be maintained" with respect to certain injuries or death of a person who was not a citizen or permanent resident alien of the United States.).

already begun." *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 377 (1933) (quoting *Smallwood* v. *Gallardo*, 275 U.S. 56, 61 (1927)).[4] That meaning has nothing to do with the *transfer* of an action from one court of competent jurisdiction to another, pursuant to a removal statute of general applicability. Removal to federal court does not collapse or terminate the action; removal simply transfers the action to a federal forum where the suit thereafter can be "maintained" to final judgment.[5]

3. The text of the relevant sentence of Section 216(b) as a whole further undermines petitioner's argument that the word "maintain" grants an employee an absolute right to continue to litigate his action to final judgment in the court in which the suit is originally filed. By providing that an employee action "*may be* maintained * * * in any Federal *or* State court of competent jurisdiction," 29 U.S.C. 216(b) (emphasis

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[4] Neither *Rose* nor *Smallwood* addressed a federal court's removal jurisdiction but rather the effect of the word "maintain" on pending lawsuits. *Smallwood*, 275 U.S. at 61, held that a statute directing that no suit seeking to restrain taxes imposed under the laws of Puerto Rico "shall be maintained" applied to actions pending before Congress enacted the statute. *Rose*, 289 U.S. at 377, similarly observed that "maintain" commonly covers "pending actions."

[5] For similar reasons, petitioner errs in relying (Br. 16-17) on a provision in the original 1938 Act that permitted an employee to designate an agent or representative "to maintain" the employee's action. Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1069; see also Portal-to-Portal Act of 1947, ch. 52, § 5(a), 61 Stat. 87 (repealing representative actions); *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 172-173 (1989) (discussing history of representative and collective actions under 29 U.S.C. 216(b) as incorporated into the Age Discrimination in Employment Act of 1967, 29 U.S.C. 626(b)).

added), the FLSA expresses no preference for the forum in which an employee action may proceed, and the Act contains no mandate that the employee's initial choice of forum must prevail over the defendant's express right of removal under 28 U.S.C. 1441(a). Such a construction also would violate this Court's "longstanding practice of construing statutes *in pari materia*." *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). Under that principle, the FLSA must be read in conjunction with other federal statutes that explicitly permit transfer of a suit from one forum to another. For instance, an FLSA action that is filed in a particular forum is presumably subject to that forum's law allowing a defendant to seek a transfer of venue when transfer serves the interest of justice. *E.g.*, 28 U.S.C. 1404; Ala. Code. § 6-3-20 (1993); Alaska Stat. § 22.15.080 (Michie 1995); Fla. Stat. Ann. § 47.122 (West 1994); Wis. Stat. Ann. § 801.52 (West 1994).

The same is true with respect to transfer by removal. Indeed, the language in Section 216(b) that an action may be maintained "in any Federal or State court of competent jurisdiction" indicates that Section 216(b) and suits brought under it take the jurisdiction of the courts as they find them, and that Section 216(b) itself was not intended to alter jurisdictional rules that are established elsewhere. As this Court explained in construing comparable language in the FELA, a state court is one of "competent jurisdiction" when "its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion." *Second Employers' Liab. Cases*, 223 U.S. 1, 56-57 (1912). But where another federal statute—here, 28 U.S.C. 1441(a)—ousts a state court of its jurisdiction upon the filing of a notice in federal district court (see 28 U.S.C. 1446(a)), the state court is no longer one of "competent jurisdiction" with

respect to the case, and the plaintiff thereafter must "maintain" his action, if at all, in the federal district court, which of course *is* a court of "competent jurisdiction."

It is significant, moreover, that Congress passed the FLSA against the backdrop of a pre-existing and long-standing right of a defendant to remove a case arising under federal law to federal district court. In 1875, Congress first created federal question removal jurisdiction by granting defendants the right to remove "*any*" suit arising under federal law in which the matter in controversy exceeded $500. Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470 (emphasis added). Although "[t]he legislative history of the federal question removal provision is meager, * * * it has been suggested that its purpose was the same as original federal question jurisdiction, enacted at the same time in the Judiciary Act of 1875, 18 Stat. 470, namely, to protect federal rights, and to provide a forum that could more accurately interpret federal law." *Boys Mkts., Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 246 n.13 (1970) (citations omitted).

By the time Congress passed the FLSA in 1938, the right of removal was codified in 28 U.S.C. 71 (1934), and extended to "[*a*]*ny* suit of a civil nature * * * arising under the * * * laws of the United States" of which the district courts had original jurisdiction. Act of Mar. 3, 1911, ch. 231, § 28, 36 Stat. 1094 (emphasis added). That all-encompassing language plainly included suits such as those under the FLSA. Morever, prior to 1938, when Congress wanted to carve out exceptions to that right of removal, it did so expressly. See Act of Apr. 5, 1910, ch. 143, 36 Stat. 291 (28 U.S.C. 1445(a)); Act of Jan. 20, 1914, ch. 11, 38 Stat. 278 (28 U.S.C. 1445(b)); Securities Act of 1933, ch. 38, § 22(a), 48 Stat. 86-87 (15 U.S.C. 77v(a)). The absence of any such express exception in the FLSA therefore is telling.

In 1948, Congress re-codified the removal statute in 28 U.S.C. 1441(a), which authorizes removal over civil suits within the district courts' original jurisdiction "[e]xcept as otherwise expressly provided by Act of Congress." Act of June 25, 1948, ch. 646, § 1441(a), 62 Stat. 937; see also 28 U.S.C. 1441 (historical and revision notes). Those provisions, coupled with the FLSA's complete silence on the issue of removal, leave no reason to doubt that Congress understood that FLSA employee actions filed in state court would be subject to removal to federal court.[6]

B. The FLSA's Use Of The Word "Bring" In Other Provisions Does Not Suggest That The Word "Maintain" In Section 216(b) Expressly Bars Removal

1. Petitioner relies (Br. 17-21) on Congress's use of the term "bring" in various provisions of the FLSA and in other federal statutes. Petitioner argues that a right to "bring" suit refers to the initiation of a suit and therefore does not foreclose removal of the case from the state court in which it was initially brought. Br. 17-18. Petitioner then argues that Congress's use of the different word "maintain" in authorizing employee actions under Section 216(b) reflects a deliberate intent on the part of Congress to confer on an employee a

[6] Petitioner argues (Br. 38-40) that Congress in passing the FLSA could not have known it would be required to foreclose removal in explicit terms because the language in the removal statute requiring an express exception was not added until 1948, after the FLSA was enacted. As the examples cited in the text demonstrate, however, even before 1938 Congress had foreclosed a federal court's removal jurisdiction with direct and explicit language.

right to pursue, or "maintain," previously filed suits through to final judgment, and hence, in petitioner's view, to defeat removal. Br. 19-21. For the reasons discussed above, a plaintiff's right under Section 216(b) to litigate a suit to final judgment says nothing about the defendant's right under a different statute to remove the case to federal court. The word "maintain" therefore does not constitute an express bar to removal.

2. That conclusion is not altered by any of the specific references in the FLSA to the right to "bring" suit.

a. Three provisions of the FLSA authorize the Department of Labor to "bring" suit to enforce provisions of the Act.[7] The Secretary's right to "bring" suit, like the employee's right to "maintain" suit, simply conveys the existence of a cause of action in court. *American Heritage Dictionary* 232 (4th ed. 2000) (defining "bring" to mean "[t]o advance or set forth (charges) in a court."). Indeed, the FLSA in Section 204(f) uses the term "bring" to describe the *employee's* right of action under Section 216(b). 29 U.S.C. 204(f) (providing that Office of Personnel Management's authority to administer FLSA with respect to certain federal employees "shall [not] affect the right of an employee to *bring* an

[7] See 29 U.S.C. 211(a) ("[T]he Administrator shall bring all actions under [S]ection 217 of this title to restrain violations of this chapter."); 29 U.S.C. 212(b) ("The Secretary of Labor * * *, subject to the direction and control of the Attorney General, shall bring all actions under [29 U.S.C. 217] to enjoin any act or practice which is unlawful by reason of the existence of oppressive child labor."); 29 U.S.C. 216(c) ("The Secretary may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.").

action * * * under section 216(b) of this title.") (emphasis added).

Moreover, the Secretary's authority to "bring" suit, like the employee's authority to "maintain" suit, necessarily carries with it the general ability to litigate the action to final judgment. There is accordingly no basis for attaching talismanic effect to Congress's use of the word "maintain" rather than "bring" in Section 216(b), either in general or specifically with respect to removal. It follows a fortiori that there is no basis for concluding that Congress's use of "maintain" rather than "bring" constitutes an express exception to the right of removal conferred by 28 U.S.C. 1441(a).[8]

b. Section 216 also provides that the Secretary's filing of a suit for monetary damages under 29 U.S.C. 216(c) or for restitutionary injunctive relief under 29 U.S.C. 217 terminates the employee's right to "bring"

[8] One possible explanation for the different terminology in 29 U.S.C. 216(c) is that Section 216(c) was not part of the original Act but was added by amendment in 1949. Act of Oct. 26, 1949, ch. 736, § 14, 63 Stat. 919. The original Act did confer on the government a right to "bring" suit, now codified under 29 U.S.C. 211(a) and 212(b), but the language originated in 1937 bills that entitled employees to "recover * * * reparation in a civil action" over which state and federal courts had concurrent jurisdiction. S. 2475, 75th Cong., 1st Sess. §§ 13, 15(b), 18(b), 22 (July 6, 1937) (reported Senate bill); see also S. Rep. No. 884, 75th Cong., 1st Sess. 8-9 (1937); H.R. Rep. No. 1452, 75th Cong., 1st Sess. 10, 18-19 (1937). The conference committee carried forward the provisions authorizing the government to "bring" suit and authorized an employee action using the "may be maintained" language now set forth in Section 216(b). H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 8-9, 11, 32-33 (1938). There is no indication that Congress attached any significance to the difference in terminology, and it thus appears that Congress used "bring" and "maintain" interchangeably to refer to a right of action. See pp. 23-25, *infra*.

an employee action under 29 U.S.C. 216(b). 29 U.S.C. 216(b) ("The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under [S]ection 217 [for back wages for such employee]."); 29 U.S.C. 216(c) ("The right provided by subsection (b) of this section to bring an action by or on behalf of any employee to recover the liability specified in the first sentence of such subsection and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection [for back wages or liquidated damages for such employee].").

As petitioner notes (Br. 18 & n.9), when the Secretary files suit for monetary relief for individual employees under Section 216(c) or 217, it has been understood that the employee's right of action under Section 216(b) terminates with respect to suits not yet filed but not with respect to actions pending at the time the Secretary files suit. *Donovan* v. *University of Tex.*, 643 F.2d 1201, 1207 (5th Cir. 1981); accord H.R. Conf. Rep. No. 327, 87th Cong., 1st Sess. 20 (1961) (filing of the Secretary's complaint does "not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff *before* the Secretary's action") (emphasis added); S. Rep. No. 145, 87th Cong., 1st Sess. 39 (1961) (Secretary's filing of complaint "terminates the rights of individuals to *later* file suit") (emphasis added); H.R. Rep. No. 75, 87th Cong., 1st Sess. 28 (1961) (same); cf. *Smallwood*, 275 U.S. at 61. The FLSA's termination provisions, however, provide no basis for finding an intent to foreclose removal. As discussed, a right to litigate an action

already pending is entirely consistent with the removal of such an action to federal court under 28 U.S.C. 1441(a).

c. A variation of the word "bring" also appears in the collective action provisions of Section 216(b) that authorize an employee or employees to bring collective actions "in behalf of himself or themselves and other employees similarly situated." See generally *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165, 173 (1989). Section 216(b) provides that "[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is *brought*." 29 U.S.C. 216(b) (emphasis added)). That provision is consistent with removal of a collective action under the FLSA. If an employee files a collective action that is subsequently removed to federal court, any employee who thereafter consents to become a party plaintiff may file his consent in federal court.

The phrase "court in which such action is brought" is reasonably understood to mean the court in which the employee's suit is pending, *i.e.*, the court in which the employee's right of action is being litigated at the time consent is filed. *Anson* v. *University of Tex. Health Sci. Ctr.*, 962 F.2d 539, 540 (5th Cir. 1992) ("Under Section 216(b), an employee may become an 'opt-in' party plaintiff to an already filed suit by filing written consent with the court where the suit is pending."); cf. *Linthicum* v. *Calvin*, 57 S.W.3d 855, 858 (Mo. 2001) (per curiam) ("Although a suit is 'brought' against the original defendants when [a complaint] is initially filed, in like manner, it is also 'brought' against subsequent defendants when they are added to the lawsuit by amendment."); *American Fin. Co.* v. *Bostwick*, 23 N.E. 656, 659 (Mass. 1890) (for purposes of section of federal

removal statute that required petition for removal to be filed in state court in which "suit is brought," "[t]he section plainly means that the petition must be filed in the suit, and therefore it must be filed in the court where the suit is pending when it is filed," such that transfer among state courts does not defeat right of removal). In any event, to the extent that the phrase "is brought" in Section 216(b) is ambiguous on this particular subsidiary point, it does not render Section 216(b) an explicit exception to the federal removal statute.[9]

C. The Principle That Removal Legislation Should Be Narrowly Construed Does Not Defeat A Defendant's Right To Remove An Action Under Section 216(b)

Invoking the principle that removal legislation should be narrowly construed (*e.g.*, *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 108 (1941)), petitioner argues (Br. 9-13, 28-38) that because the requirement in 28 U.S.C. 1441(a) for an "express[]" exception to removal was not added to the removal statute until 1948, after

[9] For purposes of the applicable statute of limitations for collective actions, an action is commenced (a) when the complaint is filed, if the person is named in the complaint and files his consent to be a party plaintiff "in the court in which the action is brought," or, (b) when those conditions are not satisfied, "on the subsequent date on which such written consent is filed in the court in which the action was commenced." 29 U.S.C. 256. That provision, too, is reasonably construed to mean that, when an employee joins a pending collective action, "his action commences when he opts into the action by filing written consent with the court in which the action is pending." *O'Connell* v. *Champion Int'l Corp.*, 812 F.2d 393, 394 (8th Cir. 1987); see also S. Rep. No. 48, 80th Cong., 1st Sess. 49 (1947) ("[A]s to any individual claimant in any such collective action, the action is deemed to be commenced as to him when he is named a party thereto.").

the enactment of the FLSA, see note 1, *supra*, the removal statute should be narrowly construed "not * * * to permit the removal of previously non-removable actions" under the FLSA as it existed before 1948. Br. 31. That analysis is seriously flawed.

1. Section 1441(a), as it is *currently* written, governs this case, and the plain terms of that statute mandate its application to "*any* civil action" of which federal district courts have original jurisdiction, "[e]xcept as otherwise expressly provided by an Act of Congress." 28 U.S.C. 1441(a) (emphasis added); cf. *United States* v. *Providence Journal Co.*, 485 U.S. 693, 705 n.9 (1988) ("A statute that begins with 'Except as otherwise provided by law' creates a general rule that applies unless contradicted in some other provision."); compare *United States* v. *Monsanto*, 491 U.S. 600, 609 (1989) (phrase "*any* property" is "broad and unambiguous" and "comprehensive"). Furthermore, because actions brought under 29 U.S.C. 216(b) unquestionably fall within the original jurisdiction of the federal district courts, there is no ambiguity in the breadth of the removal statute to which a principle of narrow construction would be relevant. In short, because nothing in the text of the FLSA bears the weight of an express exception to removal, this Court's inquiry is at an end.

2. Moreover, petitioner's premise—that, before 1948, Congress intended to bar removal of FLSA suits—is fundamentally wrong. When it passed the FLSA in 1938, Congress did not *expressly* repeal a defendant's right of removal that previously existed under 28 U.S.C. 71 (1934) for "[a]ny" civil suit arising under federal law. See pp. 14-15, *supra*. Accordingly, the only basis for accepting petitioner's contention that Congress in 1938 intended to prohibit a federal court's removal jurisdiction over FLSA suits is by *implication*.

That contention, however, not only violates the plain terms of the current removal statute requiring an "express[]" exception to the general right of removal, 28 U.S.C. 1441(a); it also violates the "cardinal rule * * * that repeals by implication are not favored," *Cook County* v. *United States ex rel. Chandler*, No. 01-1572 (Mar. 10, 2003), slip op. 12 (quoting *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936)), and will not be found unless an intent to repeal is "clear and manifest." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939) (quoting *Red Rock* v. *Henry*, 106 U.S. 596, 602 (1883)). "When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. * * * Especially is this rule to control when it appears that Congress in some cases has made express provision for effecting a change." *Rosencrans* v. *United States*, 165 U.S. 257, 262 (1897).

"In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *TVA* v. *Hill*, 437 U.S. 153, 190 (1978) (quoting *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974)). In other words, "where [the] two statutes are 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017-1018 (1984) (citation omitted); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1868).

Section 216(b) of the FLSA and the removal statute are clearly "capable of co-existence." *Ruckelshaus*, 467 U.S. at 1018. As discussed, an employee who files suit under the FLSA in state court, which the employer

subsequently removes to federal court, has the right to maintain his action in federal court and to obtain the full remedies set forth under the FLSA, including the unpaid wages, liquidated damages, costs, and attorney's fees. 29 U.S.C. 216(b). Cf. *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 808 (1976) (holding that McCarran Amendment, 43 U.S.C. 666, which consents to the naming of the United States as a defendant in suits involving federal water rights, "did not constitute an exception 'provided by Act of Congress' that repealed the jurisdiction of district courts under [28 U.S.C.] 1345 to entertain federal water suits").

D. Petitioner's Reliance On Subsequent Legislative History And Policy Arguments Do Not Furnish A Basis For Finding That The FLSA Expressly Bars Removal

1. a. We are aware of nothing in the legislative history of the FLSA, as enacted or as amended, that addresses the issue of removal. In 1937, the Senate passed a bill that would have allowed employees to recover unpaid wages (termed "reparations") in a civil action and separately conferred concurrent state and federal court jurisdiction over such actions. See S. 2475, *supra*, §§ 18, 22 (reported Senate bill); S. 2475, 75th Cong., 1st Sess. §§ 18, 22 (July 31, 1937) (Senate-passed bill, which was referred to the House of Representatives). The Senate provisions were explained as "provid[ing] for the payment of reparation" and "confer[ring] appropriate jurisdiction on the district courts." S. Rep. No. 884, 75th Cong., 1st Sess. 9 (1937). The House Labor Committee initially reported a bill with the same provisions. See S. 2475, 75th Cong., 1st Sess. §§ 18, 22 (Aug. 6, 1937) (reported House bill). The accompanying House Report stated only that "[t]he bill

specifically grants the employee a right of action." H.R. Rep. No. 1452, 75th Cong., 1st Sess. 10 (1937); *id.* at 19 (discussing payment of "reparation").

The House of Representatives did not pass the reported bill, but instead sent it back to committee. 82 Cong. Rec. 1834-1835 (1937). The House Labor Committee then reported another bill that provided no employee enforcement mechanisms. S. 2475, 75th Cong., 3d Sess. (Apr. 21, 1938) (reported bill); H.R. Rep. No. 2182, 75th Cong., 3d Sess. (1938). The House passed that bill without adding any employee enforcement mechanisms. 83 Cong. Rec. 7441-7450 (1938) (House passage). The conference committee later drafted the language that Congress ultimately enacted as Section 216(b), which provided that an action "may be maintained in any court of competent jurisdiction." H.R. Conf. Rep. No. 2738, 75th Cong., 3d Sess. 11 (1938). The committee explained that Section 216(b) "provides for civil reparations for violations of the wages and hours provisions." *Id.* at 33.[10]

The legislative history accompanying later amendments to Section 216 similarly contains no reference to removal but merely refers to the employee's right to bring suit. See H.R. Conf. Rep. No. 326, 80th Cong., 1st Sess. 13 (1947) (banning representative actions but explaining that "[c]ollective actions brought by an employee * * * may continue to be brought"); 95 Cong. Rec. 12,487, 12,488 (1949) (statement of Sen. Humphrey) (discussing amendment to permit suit by the

[10] In 1974, Congress replaced the phrase "any court of competent jurisdiction" in Section 216(b) with "any Federal or State court of competent jurisdiction" at the same time that Congress amended the FLSA to give employees the right to sue "a public agency." Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(d)(1), 88 Stat. 61; see *infra*, p. 25.

Secretary to collect unpaid wages and referring to existing law as allowing only the employee to "bring suits," "to bring civil action" or to "sue"); S. Rep. No. 145, 87th Cong., 1st Sess. 39 (1961) (referring to employee's right "to bring an action"); H.R. Rep. No. 75, 87th Cong., 1st Sess. 28 (1961) (same); S. Rep. No. 690, 93d Cong., 2d Sess. 27, 56 (1974) (amendment giving employees right to "maintain" or "to bring private actions" against public agencies); H.R. Rep. No. 913, 93d Cong., 2d Sess. 45 (1974) (amendment makes clear that suits by public employees "may be maintained" because the previous law had not explicitly stated that "State and local employees could bring an action").

In sum, the FLSA's legislative history is fully consistent with the natural reading of Section 216(b) as giving an employee a right of action over which state and federal courts have concurrent jurisdiction, subject to whatever other statutes (including the federal removal statute) regulate the jurisdiction of those courts.

b. Petitioner relies (Br. 40-41) on the Senate Report accompanying the 1958 enactment of 28 U.S.C. 1445(c) to bar removal of workers' compensation actions under state law. That Report states:

> Congress itself has recognized the inadvisability of permitting removal of cases arising under its own laws which are similar to the workmen's compensation acts of the States. In the Jones Act, the Fair Labor Standards Act, and the Railway Employers' Liability Act, all of which are in the nature of workmen's compensation cases, the Congress has given the workman the option of filing his case in either the State court or the Federal court. If filed in the State courts the law prohibits removal to the Federal court.

S. Rep. No. 1830, 85th Cong., 2d Sess. 9 (1958).

That legislative history, of course, does not constitute an express exception to removal "in an Act of Congress," as required by 28 U.S.C. 1441(a). Moreover, the Senate Report, which relates to 28 U.S.C. 1445(c) and was prepared many years after the enactment of the FLSA, hardly provides persuasive evidence of congressional intent. Cf. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 77 n.6 (1994) ("the views of one Congress as to the meaning of an Act passed by an earlier Congress are not ordinarily of great weight * * * and the views of the committee of one House of another Congress are of even less weight").

2. Petitioner also argues (Br. 22-27) that Congress when it passed the FLSA likely intended to foreclose removal because removal might have burdened employees who had claims involving small amounts and who did not have ready access to the federal courts. Those policy concerns, however, do not necessarily apply in all FLSA cases. As the district court explained in *Hill* v. *Moss-American, Inc.*:

> Nor can one fairly categorize [FLSA] actions. Barring removal of [FLSA] cases will shut out controversies involving dollar amounts ranging from quite large to very small, concerning interpretations of an Act of Congress ranging from difficult to routine, between persons who may or may not be of diverse citizenship, in localities where the congestion of trial dockets as between state and federal courts may be great or unremarkable.

309 F. Supp. at 1178.

Moreover, FLSA actions are not clearly in a category that distinguishes them from other employment-related suits arising under other federal statutes that are

subject to removal to federal court, irrespective of the amount in controversy or the potential inconvenience to the employee from removal. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987) (suit for benefits under Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(1)(B), 1132(e)(1)); *Avco Corp.* v. *Aero Lodge, No. 735, Int'l Ass'n of Machinists*, 390 U.S. 557 (1968) (Section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. 185); *Hirschbiel* v. *Johnson*, 118 F. Supp. 2d 903, 905 (N.D. Ind. 2000) (Title VII, 42 U.S.C. 2000e *et seq.*); *Keil* v. *CIGNA*, 978 F. Supp. 1365 (D. Colo. 1997) (Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.*).

Finally, regardless of whether removal of FLSA actions is good policy, it is the responsibility of Congress to weigh the relevant policy considerations and to determine whether to carve out an exception for FLSA cases to the general statutory right of a defendant to remove to federal court a case arising under federal law. *E.g.*, *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992). Because Congress has not passed a law that forecloses removal of FLSA actions in express statutory language, as required by 28 U.S.C. 1441(a), such actions are subject to removal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 2003